IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 182

KENNETH C. GORDON AND KENNETH J. MacLEOD,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE J. WALSH,
29 S. La Salle Street,
Chicago, Illinois,
GEORGE F. CALLAGHAN,
105 W. Adams Street,
Chicago, Illinois,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

LIST OF AUTHORITIES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. .....

KENNETH C. GORDON AND KENNETH J. MacLEOD,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners, Kenneth C. Gordon and Kenneth J. MacLeod, respectfully pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on May 14, 1952, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. Petition for Rehearing was denied June 7, 1952.

THE OPINION BELOW.

The Court of Appeals for the Seventh Circuit affirmed the judgment sentencing each of the petitioners to the custody of the Attorney General for a period of ten years.

The opinion has not yet been reported. It appears in the Record at page 493.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the use of a witness, called "an accomplice" by the Court below, who has given a series of statements or confessions, which do not implicate the petitioners but who, upon being offered leniency for full information, accuses the petitioners, gives rise to serious questions of credibility? And is not a defendant entitled to probe such credibility and to have such issue submitted to the jury?

2. Where the key witness for the prosecution has given damaging evidence against the defendants and it is developed on cross-examination that the witness at the time of his arrest and on several occasions thereafter made written statements to the FBI in which he failed to implicate the defendants and in fact named another person as the one from whom he obtained the stolen merchandise, is it error to deny inspection and production of and cross-examination on the previous statements so that a full and complete disclosure may be had?

3. Is it an undue restriction of cross-examination and deprivation of a fair trial to prohibit cross-examination of the Government's key witness which would have shown that at the time he entered his plea of guilty to the offense about which he testified against the defendants his own case had been referred to the Probation Department for presentence recommendation; that the witness' lawyer and the prosecutor had discussed disposition of the witness' case in chambers with the Court the previous day; that

he was advised by the Court that if he expected a recommendation for lenient sentence or for probation, it would be essential that he satisfy the Probation Department that he had given the law enforcement authorities full information, and that he was admonished by the Court that he would be "well advised" to tell the probation authorities the whole story even though it might involve others.

4. Where by equivocal instructions to the jury the defendants have been deprived of the presumption of innocence; the guilt of one or either of them became the guilt of both; has the verdict been found by the jury according to the procedure and standards appropriate for criminal trials in the federal courts?

5. Should the conviction stand, where, after a jury has deliberated for eleven hours, the trial court gives a supplemental instruction to the jury, charging that the case "must at some time be decided", and repeats the instruction in written form an hour later; and the instruction departs seriously and prejudicially from approved form, by directing that the jurors decide the case with a proper regard and deference to the opinions "of others"?

6. Has "market value" (Section 2311, Title 18, U. S. C. A.) "of $5,000.00 or more" (Section 2314, Title 18, U. S. C. A.) been proved in a prosecution for transporting stolen property from one state to another, where the only evidence on the question of value is a retail price list, showing only prices of individual rolls of film and which prices admittedly include a charge for processing and developing the film? And is not this proof particularly deficient, where the film is in a wholesale lot, and the amount of the service cost or charge was kept out of evidence by the Government's objections?

SUMMARY STATEMENT OF MATTER INVOLVED.

The record is lengthy but the facts necessary to a disposition of this proceeding lie within narrow compass.

Petitioners were indicted on four counts, I and III of which averred their unlawful possession of goods stolen while in interstate commerce, in violation of 18 U. S. C. 659, and II and IV, that they caused the property mentioned in I and III to be transported further in interstate commerce in violation of 18 U. S. C. 2314. The jury found both petitioners guilty, whereupon judgment entered, imposing upon each a sentence of ten years.

The salient essential facts are as follows: On July 10, 1950, a large quantity of camera film was stolen from an interstate shipment which had, as its origin, Rochester, New York and, as its destination, Chicago, Illinois. No point was made on appeal or is made in this proceeding as to the theft from the interstate shipment. The charges against petitioners concern the possession and transportation in interstate commerce after the theft.

James A. Marshall was the Government's chief and key witness. It was upon his evidence as to the meetings, conversations and happenings between the witness, one Swartz, and the petitioners on July 20 and July 27, 1950 that the conviction rests. His evidence implicating the petitioners with the occurrence on July 20, 1950, was uncorroborated. Agents of the FBI did corroborate Marshall's testimony as to certain physical activities on July 27, 1950, but did not hear any conversations which were described by Marshall, and which were essential in considering knowledge and intent of the petitioners. Swartz died before trial and was dismissed from the indictment.

Marshall testified that on July 20, 1950, he and the deceased Swartz came to Chicago from Detroit and obtained

some of the stolen film from Gordon and a man "who resembled MacLeod" (R. 155); that he and Swartz took the film back to Detroit; that on July 22, 1950, he and Swartz procured additional film from Gordon (R. 162-3). (This offense was not charged in the indictment.) On July 27, 1950, he and Swartz again came to Chicago; met Gordon at his jewelry store and were given directions to an address in Chicago where he met MacLeod and again obtained film which they took back to Detroit (R. 166-170). Marshall was arrested in Detroit on July 28, 1950, and a part of the stolen film was found in his possession (R. 176). He had sold some and given the money to Swartz (R. 178).

Cross-examination developed that on arrest he was questioned for an hour by FBI agents and made a written statement or confession. (The District Attorney was asked if he had the statement and said he didn't have it in Court.) A demand for its production was denied (R. 194). It was shown the statement in no way implicated either defendant and a demand for its production was again denied (R. 205). In this first statement he said he got the film from Swartz (R. 205) but didn't remember if he said he purchased it from Swartz (R. 206). After his arrest on July 28th it was an every day occurrence for him to make statements to the FBI (R. 206). He made quite a few statements, either four, five or six and signed each one and each statement varied slightly. Each time he added something he remembered (R. 206). Between July 28th and August 25th he made five statements to the FBI but did not implicate the defendants until August 25, 1950 (R. 207), a week after his own plea of guilty in Detroit on August 18th, 1950 (R. 197). A demand for the production and inspection of all of these statements was again made and denied (R. 207).

Marshall came to Chicago on the first occasion at

Swartz's suggestion (R. 172) and gave Swartz the money he collected on the film he sold in Swartz's office (R. 178). Swartz paid his expenses from Detroit to Chicago on the first trip (R. 180). He didn't remember if he gave Swartz any more than $1050.00 (R. 186). At the garage on July 20th it was Swartz who selected the film to be put in the car (R. 191). The only person to whom he gave any money was Swartz (R. 207). He gave Swartz some money but didn't remember whether it was several hundred dollars or forty dollars or ten dollars nor when he gave it to him. He had $600 or $700 in his pocket on the first trip to Chicago and may have given Swartz around $300 (R. 208). He was to turn the money over to Swartz as he sold the film (R. 208). He and Swartz were splitting the profits. Prior to July 20th he had done business with Swartz and had gotten things off of Swartz (R. 209). He never saw Swartz give Gordon or MacLeod any money (R. 218). On each occasion part of the film was dropped off at Swartz's home in Detroit.

Marshall insisted throughout his cross-examination that he was not testifying by reason of any threats, hope, or promise of immunity. (See footnote to opinion Court of Appeals (R. 498).) He said that no person had suggested to him that if he cooperated with the authorities, and testified against others, that he would get consideration (R. 204).

Cross-examination as to whether at the time of his plea of guilty in Detroit he was advised in open Court that his counsel and the prosecutor had been in chambers and discussed disposition of his case with the Judge was met by objection (R. 198). The jury was excluded and defendants offered to prove from a transcript that at the time he entered his plea of guilty, he insisted to the Court, over that plea, that he still was not guilty; that he told the

Court no one had promised him anything and that in open Court the District Judge said to him:

> "Very well, the plea of guilty is accepted. Now I am going to refer your case to the Probation Department for presentence report. I think I should say to you, as I said to your lawyer yesterday when he and Mr. Smith called upon me in chambers yesterday morning, that it seemed to me that if you intended to plead guilty and expected a recommendation for a lenient sentence or for probation from the Probation Department that it would be essential that you satisfy the Probation Department that you have given the law enforcement authorities all the information concerning the merchandise involved in this proceeding and it is very important for the law enforcement authorities to apprehend all of those who participated in this rather large theft from the interstate commerce shipment. I am not holding out any promises to you, but I think you would be well advised to tell the probation authorities the whole story even though it might involve others." (R. 198-199.)

The Court sustained the Government's objection and forbade the proffered cross-examination (R. 200). Counsel for the defendants were forbidden to ask the witness whether he had been told by the District Judge that if he expected any leniency he better cooperate with the law enforcement authorities (R. 200).

To establish "value of more than $5000.00" necessary under Section 2314 Title 18 U. S. C. the Government relied upon one Vayo, Traffic Manager of Eastman Kodak Company, the shippers. (Failure of proof thereon was raised in the Court of Appeals but not ruled on specifically in the opinion.) His testimony was based upon a retail price list printed by the Company (R. 31-32). He did not testify to any sale or offer of sale. He did not know the selling price in Chicago (R. 55). He said he was familiar with the prices to the Eastman Stores in Chicago (R. 55) be-

cause of what is shown on the 1949 price list from which he testified (R. 56). This was all the Government's proof on value.

The petitioners both testified and denied all complicity in the offenses. Both gave evidence tending to prove that the film belonged to Swartz and that it had been stored by them as an accommodation to Swartz and turned over to Swartz when he and Marshall called for it on July 27th, 1950. They denied all knowledge of its stolen character. Gordon (R. 338-356) MacLeod (R. 358-390).

Included in the charge to the jury was the following:

> "Now, before you can find either defendant guilty on Counts 1 and 3 of the indictment the Government must prove, from all of the evidence and beyond a reasonable doubt, all of these 4 things:
>
> * * * * * * *
>
> "If the Government proves all four of these propositions beyond a reasonable doubt as to **either or both** of the defendants on Counts 1 and 3, then such defendant or defendants can be found guilty by you on such count; otherwise they should be found not guilty on such count. (R. 431.)
>
> * * * * * * *
>
> "Now, as to Counts 2 and 4, before you can find either defendant guilty under the charges contained in Counts 2 and 4 of the indictment, the Government must prove beyond a reasonable doubt each of the 4 following items:
>
> First, that the defendants, or **one of them, either of the defendants, a particular defendant,** knowingly transported, actively participated in or aided in transporting in interstate commerce from the City of Chicago in Illinois, to the City of Detroit, in Michigan, the merchandise described in Counts 2 or 4." (R. 432.)
>
> * * * * * * *
>
> "If the Government successfully proves all four of those items with reference to **either** Counts 2 or

4 beyond a reasonable doubt against **either or both** defendants, then you can find such a defendant guilty on such count." (R. 433.)*

* * * * * *

"Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that the defendant, or **either of them**, is guilty as charged in the indictment." (R. 434.)†

(This was the only charge given on the presumption of innocence.)

At 10:35 P. M., the jury having been out 11½ hours, the Court advised counsel he would give the jury an instruction as taken from *Allen v. United States*, 164 U. S. 429 (R. 445). The Court stated that if the jury requested further instructions he would advise them that the instructions already given were sufficient to guide their further deliberations (R. 446). Over objection (R. 445) the Court gave the supplemental instruction which included the following:

"Although the verdict to which each juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet in order to bring 12 minds to a unanimous result, you must examine any questions submitted to you with candor and with a proper regard and deference to the **opinions of others**. You should consider that **the case must at some time be decided.**" (R. 446-7.)

At 11:30 P. M., at the request of the foreman of the jury, and out of the presence of the petitioners and without

* Exception appears R. 440.

† No exception was taken to this instruction and the Court of Appeals was requested to consider it as "plain error" because of the importance of the presumption of innocence.

notice to them or to their counsel, a typewritten copy of that charge was sent to the jury room (R. 471).

REASONS FOR ALLOWANCE OF WRIT.

I.

On cross-examination of the Government's main witness defendants elicited that following his arrest by agents of the FBI he made a written statement concerning the details of the crime in which he in no way implicated either defendant. Furthermore he admitted having made four or five additional statements to the FBI between the date of his arrest and August 25, 1950. The statements varied from each other, and it was not until the last one, on August 25, that he in any way connected the defendants with the undertaking (See opinion, R. 495).

Inspection and production of these statements was denied by the trial Court (R. 194, 205, 207), and the Court of Appeals affirmed the denial (R. 484-497).

The Court of Appeals finds a conflict of decision in that some Circuits have held that the courts should compel production of pertinent documents and other Circuits have held it is not always error to refuse to order their production (R. 495-6).

The Court of Appeals has held there was no impeachment basis shown between the statements of the witness and his cross-examination because the witness admitted he had not named the defendants in the statements first made to the FBI (R. 496).

The Court's finding makes it pointedly apparent why the statements should have been produced. Necessarily, only an examination of the statements would show the extent to which they varied and contradicted the witness in particulars other than those disclosed by the preliminary

cross-examination. The opinion of the Court of Appeals in assuming, speculatively, that the statements had no value for impeachment purposes assumes that the exploratory nature of the cross-examination must have been limited to a consideration of the fact that the witness had not named the defendants in the statements. The holding of the Court of Appeals excludes the idea that lies at the bottom of all cross-examination, to-wit, that it is designed, not only to develop the facts of a case, but to test the witness in matters of recollection, of prejudice or bias, motive, and of truthful statement.

The holding of the Court of Appeals is in conflict with the decision of this Court in *Alford* v. *United States*, 282 U. S. 687, stating "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; * * * To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial (Citing cases)."

The holding of the Court of Appeals on this point is also in direct conflict with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Krulewitch*, 145 F. 2d 76 (Br. p. 56), and the Court of Appeals for the Eighth Circuit in *Heard* v. *United States*, 255 F. 829.

Petitioners were tried and convicted by the Government and sentenced to terms of imprisonment for ten years while at the same time evidence was kept out of the trial that might have shown Marshall was unworthy of belief and which might have shown the complete innocence of petitioners. This practice has been uniformly condemned by the Court of Appeals for the Second Circuit. *United States* v. *Zwillman*, 108 F. 2d 802 (C. A. 2d, 1940), *United*

States v. *Andolschek*, 142 F. 2d 503 (C. A. 2d, 1944), *United States* v. *Beekman*, 155 F. 2d 580 (C. A. 2d, 1946), *United States* v. *Grayson*, 166 F. 2d 863 (C. A. 2d, 1948), cf. *Edwards* v. *United States*, 312 U. S. 473, 61 S. Ct. 669, 674 (1941).

The case of *Goldman* v. *United States*, 316 U. S. 132 cited in the opinion herein (R. 497) is not remotely apposite to the facts of this case. The case holds only that there is no error in denying inspection of the notes and memoranda made by a witness during an investigation when the notes or memoranda are not used in Court. The case did not involve, as here, a series of statements or confessions made to the FBI by a participant in the crime shortly after his arrest.

The language of this Court in the recent case *On Lee* v. *United States*, 96 Law. Ed. Adv. Op. 776 is appropriate here, "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to *probe credibility by cross-examination* and to have the issues submitted to the jury *with careful instructions*." (Italics ours.)

II.

The Court of Appeals has so far departed from the established decisions, and the usual and accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals has overlooked the important bearing which the witness's hopes for lenient sentence and his relationship to the prosecution had on his motive in testifying. As appears in the footnote to the opinion, the witness had repeatedly disavowed any promise or hope

of consideration for his testimony (R. 497-8-9). Had the transcript of the proceedings in Detroit been admitted in evidence or a reasonable cross-examination permitted thereon, it would have been disclosed that Judge Levin in Detroit had made statements to the witness from which he must have believed that he could expect a lenient sentence or probation for his cooperation with the law enforcement authorities (R. 198-201). Had this proceeding in Detroit been admitted and cross-examination permitted thereon, the jury would have seen and learned that Marshall's testimony that he had no hopes or promises was untrue. It would have shown his motive and the relationship which existed between this would-be probationer and the party for whom he was testifying. The lower Courts have misapprehended the purport of the decision in *Alford* v. *United States*, 282 U. S. 687, 692. There an analogous situation was presented and this Court, with respect to the limitation of cross-examination, said:

> "The purpose obviously was not, as the trial court seemed to think, to discredit the witness by showing that he was charged with crime, but to show by such facts as proper cross-examination might develop, that his testimony was biased because given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States, which was conducting the present prosecution."
>
> * * * * * * *
>
> "The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error." (Citing cases.)

The cross-examination of Marshall relative to the proceedings in Detroit was not limited to his impeachment on previous answers on which he denied promises or hopes of immunity but extended to his motive and his relationship to the prosecution. See *Meeks* v. *United States*, 163 F. 2d 598, (Br. p. 57).

We call the attention of the Court to the direct examination of the witness Marshall. Therein the prosecutor opened the door widely for a cross-examination as broad as that sought by the defendants, and it was error to deny the requested details of the proceedings had in the Detroit Court. At R. 175 the following appears:

> "Q. In connection with the charges arising out of such arrest have you entered any plea in the Federal District Court of Detroit?
>
> "A. Yes, sir, I pleaded guilty on possession of this film.
>
> "Q. And have you been sentenced as yet in connection with the matter?
>
> "A. No, I haven't."

While the Court of Appeals recognizes the well established law and that Marshall was the type of witness requiring the most extended freedom of cross-examination (R. 494), it affirms the denial of that freedom (R. 500).

In this regard the decision herein is at variance and in conflict with the decision of this Court in *Alford* v. *United States*, 282 U. S. 687, and of the Ninth Circuit in *Meeks* v. *United States*, 163 F. 2d 598, the Sixth Circuit in *Sandroff* v. *United States*, 158 F. 2d 623, and *Farkas* v. *United States*, 2 F. 2d 644.

The decision and opinion of the Sixth Circuit in *Farkas* v. *United States*, 2 F. 2d 644, 647, is directly in point and clearly indicates the error here.

> "Inasmuch as the question involved is the motive for testifying falsely and therefore the state of mind of the prosecuting witnesses, the relevant evidence is not alone the acts or attitude of the district attorney but anything else that would throw light upon the prosecuting witnesses' state of mind. *It is therefore entirely proper, either by cross-examination of the witness himself, or otherwise, to show a belief or even only a hope on his part that he will secure immunity or a lighter sentence, or any other favorable treatment, in*

return for his testimony, and that, too, even if it be fully conceded that he had not the slightest basis from any act or word of the district attorney for such belief or hope. The fact that despite a plea of guilty long since entered, the witness had not yet been sentenced, is proper evidence tending to show the existence of such hope or belief." (Italics ours.) This case is cited three times in *Alford* v. *U. S.*, 282 U. S. 687.

III.

Guilt has not been found by a jury according to the procedure and standards appropriate for criminal trials in the Federal Courts, where the following instructions given to the jury on the trial of two defendants were found only to be "arguably improper" but not error by the Court of Appeals:

"Now, before you can find either defendants guilty on Counts 1 and 3 of the indictment the Government must prove, from all of the evidence and beyond a reasonable doubt, all of these 4 things:

. . . . . .

"If the Government proves all four of these propositions beyond a reasonable doubt as to **either or both** of the defendants on Counts 1 and 3, then such defendant or defendants can be found guilty by you on such count; otherwise they should be found not guilty on such count (R. 431).

. . . . . .

"Now, as to Counts 2 and 4, before you can find either defendant guilty under the charges contained in Counts 2 and 4 of the indictment, the Government must prove beyond a reasonable doubt each of the 4 following items;

"First, that the defendants, or **one of them, either of the defendants, a particular defendant,** knowingly transported, actively participated in or aided in transporting in interstate commerce from the City of Chicago in Illinois, to the City

of Detroit, in Michigan, the merchandise described in Counts 2 or 4" (R. 432).

"If the Government successfully proves all four of those items with reference to either Counts 2 or 4 beyond a reasonable doubt against **either or both** defendants, then you can find such a defendant guilty on such count" (R. 433).**

"Now, the defendants in this, as in every other criminal trial, come to court presumed to be innocent, and that presumption protects them until such time as when the jury shall believe from the evidence beyond a reasonable doubt that the defendants, or **either of them**, is guilty as charged in the indictment" (R. 434).

A reading of the quoted instructions should make clear, without argument, the error urged.

No exception was taken to the last quoted instruction by which the jury was advised that the presumption of innocence obtains (as to both defendants) until such time as the jury shall believe beyond a reasonable doubt that "either of them" is guilty. Because the presumption of innocence lies at the foundation of the administration of our criminal law we request that this Court notice this as "plain error".

The decision of the Court of Appeals in holding these instructions not to be error is in direct conflict with the decision of the Court of Appeals for the Third Circuit in *Kosak* v. *United States*, 46 F. 2d 906, and the rationale of the decisions of this Court in *Bollenbach* v. *United States*, 326 U. S. 607, 613 and *Coffin* v. *United States*, 156 U. S. 432.

** Exception appears R. 440.

IV.

In the case at bar, the jury retired to deliberate at about 11:00 A. M. The trial Judge had instructed the Jury orally. At 3:00 P. M. that day the Court sent a transcript of his oral charge, which had been written by the Court Reporter to the jury. The trial Court stated that this was his regular practice, although the attorneys for the petitioners were not aware of this practice and had no actual notice that this transcript was to go to the jury or did go (R. 470-474).

At about 10:30 P. M. the jury had not returned a verdict, nor communicated to the Court. The Court called counsel to chambers and notified them that he intended to submit the "charge in the Allen case" (R. 445) (See *Allen* v. *United States,* 164 U. S. 492).

Counsel for the petitioners excepted to the instruction on the ground that it was coercive and that it instructed the jury that "the case must at some time be decided".

The Judge then stated that he would give the instruction and that nothing further would go to the jury (R. 446).

As given the instruction said, "* * * You must examine any question * * * with candor and a proper regard and deference to the opinions of others" (R. 447).

An hour later at 11:30 P. M. the foreman of the jury informed the Court that the jury desired a copy of this charge. The Court sent in a typewritten copy from which he had read (R. 471). Neither the petitioners nor their attorneys were present or had notice of this transaction (R. 470-474). The Jury delivered its verdict at 3:10 A. M. the following morning.

The Court of Appeals recognized, in its opinion, the departure from proper language, but held that the errors did not prejudice the defendants (R. 500-501). It made

no mention of the repetition of the instruction and the failure to afford notice or opportunity to object to the repetition.

Generally any communication with the jury out of the presence of and without notice to the defendants or their counsel is error. *Fillipon* v. *Albion Vein Slate Co.*, 250 U. S. 76, 81.

It is not true that a case must at some time be decided. A case may be so weak, circumstantial or dependent on witnesses whom no twelve persons could believe that a verdict could never result. *Peterson* v. *United States*, 213 Fed. 920, 926; *Quong Duck* v. *United States*, 293 Fed. 563, 565.

As given in this case at 10:30 P. M. and again at 11:30 P. M. after the mixed jury of eight (8) women and four (4) men had been confined for almost twelve (12) hours, can it be unreasonable to urge that the instruction as worded was equivocal and highly coercive? Might not these good citizens have reasonably believed that the language meant that they would be kept in session until a verdict was reached?

It is urged that this Court should compel compliance with the Court of Appeals' statement, "However, we should observe that the Supreme Court, in the *Allen* case, fixed the extreme limits beyond which a trial court should not venture, in advising the jury as to its duty to attempt to agree" (R. 501).

The admonition of the Court that the "opinions of others" should be considered could have caused the jury to believe after many hours of argument and continued confinement that the opinions of the press, the witnesses, Judge, prosecutor and general public should be considered.

The Court of Appeals holds this construction to be over meticulous, but it should be borne in mind that this

instruction came to the jury about twelve (12) hours after the original charge. The jury was not told to consider this supplemental charge together with all other instructions. The very fact that the jury requested a written copy, demonstrates that the supplemental charge was an undue and persuasive, if not coercive factor in the guilty verdict, returned at 3:10 A. M., after sixteen (16) hours of confinement and deliberation.

The increasing frequency with which some trial courts seek a disposition of protacted trials, by use of an admonition to agree, should be governed and restrained by an authoritative statement of the actual extreme limit beyond which trial courts cannot venture or err in advising the jury as to its duty to agree. This would settle a matter now left in doubtful authority because of equivocal action of the Court of Appeals, which affirmed the trial court's violation of the limit prescribed by the *Allen* case.

V.

Under Counts 2 and 4 charging violations of Section 2314, Title 18 (see Appendix) a value of Five Thousand Dollars ($5,000.00) must exist, if the goods charged to have been transported are to be the subject of federal prosecution.

As to the value of the film the only witness relied upon by the Government was Vayo.

Asked as to the value of the film involved he requested permission to refer to notes. His notes were made simply from a price list of the Eastman Company (R. 32). He did not know the price at which the film sold in Chicago (R. 55) and knew only what "the books show, what is shown on the 1949 price list" (R. 56).

No appraisal evidence or opinion, evidence by qualified

persons trading in the film or capable of appraising it, was offered, and no sale or offer to sell was proved.

It appeared on cross-examination of Vayo that all of the moving picture film is subject to the right of the consumer to have it processed and developed and that this factor was not evaluated. Vayo did not know its value (R. 71, 72).

Under these circumstances it is submitted that no proper or sufficient proof of this jurisdictional requirement of value under the statute was made. It is not appropriate to distinguish or support this position by reference to cases on value. The point made by petitioners is that there is no proof on which a judgment could be based on this essential factor in the offense.

The Court of Appeals does not discuss this point specifically, other than by reference, in stating that proof was sufficient to sustain the verdict if viewed in the light most favorable to the Government (R. 494).

The importance of the point is apparent when the sentences imposed on the petitioners are considered. The sentence was ten years each, the maximum on Counts 2 and 4. Counts 1 and 3 will not sustain more than one (1) year each, because no allegation of value was made in those counts, and therefore they charged misdemeanors under Section 659, Title 18, U. S. C. (See. Appendix). *Cartwright* v. *United States* (C. A. 5), 146 F. 2d 133.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN,
Attorney for Petitioner Gordon.

MAURICE J. WALSH,
Attorney for Petitioner MacLeod.

APPENDIX.

STATUTES INVOLVED.

Title 18, United States Code, Section 659, so far as pertinent provides:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle * * * ; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen;
>
> * * * * *
>
> "Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Title 18, United States Code, Section 2314, provides:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud;
>
> * * * * *
>
> "Shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Title 18, United States Code, Section 2311, defines value:

> "'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the values thereof."